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No. 91-119

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In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ of Certiorari To
The Supreme Court of Wisconsin

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Wisconsin Supreme Court correctly determined that Wisconsin's franchise tax statute was preempted by the provisions of Pub. L. No. 86-272 on the basis that the only nexus between the William Wrigley, Jr. Co. and the State of Wisconsin consisted of the solicitation of orders for approval and delivery from a point outside the state.

LIST OF PARTIES

The parties to this action are the Wisconsin Department of Revenue and the William Wrigley, Jr. Company.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The published decision from which review is sought is reprinted in the appendix to the petition (A 1). *William Wrigley, Jr. Co. v. DOR*, 160 Wis. 2d 53, 465 N.W.2d 800 (1991). In a unanimous decision, the five member Wisconsin Tax Appeals Commission initially upheld Wisconsin's franchise tax assessment against Wrigley (A 218). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Docket No. I-8591, Wis. Tax Rptr. [CCH] ¶ 202-792 (November 18, 1986). After a procedural remand (A 204), *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Dane County Circuit Court, Case Nos. 86-CV-6679 and 86-CV-6796, Wis. Tax Rptr. [CCH] ¶ 202-905 (August 20, 1987), the Commission, with one

commissioner dissenting and another not participating, reinstated its original decision (A 163). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Docket No. I-8591, Wis. Tax Rptr. [CCH] ¶ 202-792 (November 25, 1987).

On appeal, the circuit court reversed the Commission's decision reinstating the assessment (A 78). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Dane County Circuit Court, Case Nos. 87-CV-7468 and 87-CV-7478, Wis. Tax Rptr. [CCH] ¶ 203-000 (October 19, 1988). In a published decision with one judge dissenting, the Wisconsin Court of Appeals reversed the circuit court, finding that the Commission reached the correct result in upholding the assessment (A 46). *William Wrigley, Jr. Co. v. Wis. DOR*, 153 Wis. 2d 559, 451 N.W.2d 444 (Wis. App. 1989). The Wisconsin Supreme Court, in turn, reversed the court of appeals' decision and voided six years of franchise tax assessments against the respondent (A 1).

JURISDICTION

The judgment from which review is sought was filed on February 19, 1991 (A 1). Pursuant to Supreme Court Rule 30.3, Justice Stevens issued an order granting petitioner an extension of time through July 19, 1991, in which to file a petition for a writ of certiorari. *Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*, No. A-850 (May 13, 1991). The petition was filed on July 19, 1991. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provision

U.S. Const. art. I, § 8, cl. 3 provides:

> The Congress shall have power
>
> . . . .
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

II. Statutory Provisions[1]

Public Law No. 86-272, codified at 15 U.S.C. § 381, provides, in relevant part:

> Minimum Standards
>
> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after . . . [September 14, 1959], a net income tax on the income derived within such State by any person from interstate commerce if the *only* business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the *solicitation of orders* by such person, or his representative, in such State for sales of tangible personal property, which orders are *sent outside the State for approval* or rejection, *and*, if

[1]The full text of the statutory provisions is printed in the appendix to this brief (PA 1-12).

approved, are *filled by shipping or delivery from a point outside the State*;

(Emphasis supplied.)

Section 71.01(2), Wis. Stats. (1973, 1975, 1977 and 1979–80), provides in relevant part:

> FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation . . . shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year . . . .

STATEMENT OF THE CASE

On October 6, 1980, the Wisconsin Department of Revenue issued a franchise tax assessment against Wrigley for tax years 1973 through 1978 in the total amount of $246,641.04, including interest and penalties (Ex. 1).[2] The assessment was computed using a three-factor

[2]All exhibits and transcripts are located in the administrative record (R. 15).

apportionment formula (payroll[3], property[4], and sales) similar to formulas employed by other states that impose an income or franchise tax on multistate corporations (Ex. E to Ex. 1). Wrigley's Wisconsin sales were used to calculate the numerator of the sales factor, while its total national sales were used to calculate the denominator (Ex. E 3 to Ex. 1):

	Total Sales	Wisconsin Sales	Percentage[5]
1973	$141,549,012	$2,797,055	2.0
1974	$163,849,407	$3,184,703	3.9
1975	$209,559,026	$3,898,041	3.7
1976	$226,853,897	$4,025,372	3.5
1977	$220,047,272	$4,091,568	3.7
1978	$234,182,784	$4,392,202	3.8

[3]The payroll component was computed using total remuneration shown on Wisconsin unemployment tax forms (which ranged from $47,738 in 1973 to $232,731 in 1978) as the numerator and total remuneration shown on federal unemployment tax forms (which ranged from $24,982,112 in 1973 to $43,463,023 in 1978) as the denominator (Ex. E 2 to Ex. 1).

[4]The numerator of the property component, based largely on figures provided by Wrigley (JA 124–25; Ex. 13), was computed using the average value of automobiles, gum, promotional material and displays in the possession of Wrigley's Wisconsin representatives (which ranged from $54,979 in 1973 to $64,385 in 1978) with total property, plant and equipment shown on Wrigley's balance sheet (which ranged from $71,678,820 in 1973 to $92,307,084 in 1978) used as the denominator (Ex. E 1 to Ex. 1).

[5]Under the single factor sales formula approved in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, *reh. denied*, 439 U.S. 885 (1978), Wisconsin could constitutionally have levied a corporate franchise tax on these percentages of Wrigley's apportionable income.

After aggregating all three factors, franchise tax was levied at the appropriate rate on the following percentages of Wrigley's apportionable income (Exs. A-B and E to Ex. 1):

	Apportionable Income	Taxable Income	Percentage
1973	$11,714,751	$86,663	0.73
1974	$ 8,734,375	$90,185	1.03
1975	$31,862,282	$316,069	0.99
1976	$40,204,964	$379,069	0.94
1977	$33,655,109	$342,429	1.01
1978	$40,931,813	$443,374	1.08

The tax itself ranged from $6,628 in 1973 to $34,806 in 1978, and totalled $129,677 for all six years (Ex. A-B to Ex. 1).

In its administrative appeal, Wrigley did not challenge the Department's computations, but did claim that the assessment was barred by the provisions of § 381 (Ex. 2). A hearing was held before a single commissioner on August 26 (T_1) and August 27(T_2), 1985, at which testimony concerning Wrigley's corporate practices was presented by its tax manager, two resident sales representatives during this period and the two Wisconsin resident regional managers from 1973 through 1978.

Despite its large sales volume, Wrigley voluntarily and intentionally files income or franchise tax returns only in those states where it has real estate, offices, warehouses, manufacturing plants or training facilities, unless it is contacted by a state taxing authority (JA 5-10, 16-17; T_1:25-35, 53-54). Although Wrigley has generally been successful in repelling such contacts through persuasion or by litigation, it continued to file in Alabama after settling that state's claim because there were economic advantages in doing so (JA 7-8; T_1:31).

Wrigley's "activities are basically the same across the United States." (T_1:51). Its domestic advertising ranged from $23,600,000 in 1974 to $39,800,000 in 1978, and included local television, radio and newspaper advertisements in Wisconsin placed by Wrigley's independent advertising agency located in Illinois. (JA 14; T_1:39; Exs. 31-45; Ex. 46.) In states, like Wisconsin, where Wrigley has no land or physical plant, it is not licensed to do business and has no bank accounts or telephone listings within the state (JA 10-12; T_1:35-36). Wrigley owns no trucks, and ships goods almost exclusively by common carrier (JA 11; T_1:35). Product prices are established in and orders generally forwarded for shipment and approval to Illinois, where Wrigley's corporate headquarters is located (JA 3; T_1:26, 51). The only items of property in such states carried on Wrigley's books are station wagons and gum (which is listed as inventory) supplied to its employes (JA 13; T_1:38).

Wrigley, which had from four to six full-time employes residing in Wisconsin during this time period, pays state unemployment taxes on their salaries (JA 11; Ex. E 1:2 to Ex. 1; T_1:35-36). They receive no reimbursement for offices in their homes, but are provided with company-owned station wagons and are reimbursed for automobile maintenance, long distance telephone calls and overnight travel, meals and lodging (JA 14; T_1:38).

Wrigley divides the country into districts, regions and sales territories (T_2:4,36). Wisconsin is part of the Midwestern district, headquartered in Bensonville, Illinois (JA 24, 47; T_1:66; T_2:4-5). Most of Wisconsin is located in the Milwaukee region (T_2:37). One representative is assigned to each territory within a region. (T_2:6).

Representatives are assigned both direct and indirect accounts (JA 26; T_1:68). Direct accounts are wholesalers, vendors and grocery chains that receive large quantities of gum and are therefore eligible for direct billing (JA 26;

T_1:68). Indirect accounts are retailers that are not billed by Wrigley, but purchase stock from wholesalers (JA 26; T_1:68). The representatives were supplied with business cards that listed only the address and telephone number of the district office (JA 24; T_1:66).

A pack of gum retailed for twenty cents in 1978 (Ex. 41). In 1978, Wrigley indicated that at any given time, a sales representative had in his possession display stands with a manufacturing cost of $3,000 as well as gum with an average value of $3,750[6] (JA 124-25; Ex. 13). The amount of this gum which was stale, replaced product could sometimes range as high as forty percent (JA 61; T_2:21-22). A representative generally had 1,500 to 1,800 hundred stick boxes of gum and forty to seventy-five cases containing various numbers of display stands on hand and typically stored such items in both the garage and the basement (JA 28; T_1:70-72). Gum not sold in bags came in five or seven stick packages, with 720 variously-wrapped packages to the case (T_1:70-71).

Each day calls were made, the representative selected thirty to thirty-five displays and the equivalent of six cases of gum with which to call on accounts (JA 35; T_1:86). The displays and gum together filled the entire rear compartment of the station wagon and often the back seat as well (T_2:177). Since most accounts were not direct, the bulk of the representative's time was spent calling on retailers (JA 36; T_1:87). The representative attempted to convince the retailer to accept display stands and to place both new and existing stands in locations that facilitated impulse buying (JA 36-37, 122; T_1:87-88; T_2:179-80). New stands, which were installed daily, were filled by either the retailer or the representative from the retailer's inventory,

[6]In 1985, Wrigley's employes estimated the wholesale value of such gum to average approximately $1,000, but they expressed uncertainty about that figure (JA 29, 61, 121; T_1:71; T_2:21-22, 178).

although it was sometimes necessary to exchange sizes and brands with the retailer in order to do so (JA 43-44, 119; T_1:98; T_2:174-75). Approximately once per month, if that procedure were not feasible and the retailer insisted upon filling a new stand, the representative used his own inventory and gave the retailer an agency stock check as a receipt (JA 44, 120-21; T_1:99; T_2:174-75). Wrigley would then bill the wholesaler who, in turn, would bill the retailer for the goods delivered by the representative (JA 38, 120; T_1:89; T_2:175). The retail value of such transactions did not exceed twenty dollars per occurrence (JA 38, 121-22; T_1:89-90; T_2:179).

Some gum carried by representatives was given away as samples, but most of it was used to replace outdated or damaged product at no cost to the retailer (JA 40-41; T_1:94; T_2:174). Depending on the practice of the particular representative, the stale or damaged gum was shipped by common carrier to Illinois or discarded in local landfills in Wisconsin (JA 39, 118; T_1:92; T_2:172).

Approximately eighty-five percent of a representative's time was spent calling on accounts, while ten percent was spent on general correspondence and five percent preparing reports required by Wrigley (JA 45; T_1:100). In addition to commonplace reports such as expense accounts and itineraries, these items included a monthly inventory reconciliation for the representative's stock of gum and a computerized report form requiring the representative to tally Wrigley's brand distribution at each location, which was forwarded to an independent firm in Illinois for tabulation (T_2:77-78, 122).

The representatives in the Milwaukee region were supervised by a resident regional manager, who spent fifteen to twenty percent of his time on administrative duties such as preparing and reviewing reports (JA 50; T_2:9, 69-73). The regional manager made staffing recommendations, including those relating to hiring and

firing (JA 52-53; T_2:11, 69-73). When hiring became necessary, the regional manager contacted local universities and employment agencies or offices, including job service offices operated by the State of Wisconsin, and would sometimes advertise in local newspapers (JA 53-54, 92-93, 102; T_2:11-13, 109, 126). He would then conduct two or three interviews of prime candidates at local public or private employment agencies or in local hotels or restaurants (JA 53-54, 93; T_2:12-13, 109). The regional manager made the final selection for vacancies, which averaged about one per year, at which point the district manager's approval became necessary (JA 54, 93; T_2:13, 110). Two or three representatives were also fired during this period by the regional manager with the approval of the district manager, including one "rather spontaneous on the spot dismissal" (JA 75, 105-06; T_2:44-45, 136-37).

After being hired, the representative was assigned a sales territory by the regional manager, who had an ongoing responsibility to ensure that such territories remained balanced (JA 81; T_2;59, 60, 132-33). He would occasionally redraw them, subject to the approval of the district manager (JA 82, 111; T_2:60, 162). Since Wrigley did not open its Illinois training center until 1979, it was also the regional manager's responsibility at this time to train new hires (JA 50-51; T_2:9, 15). He did so by assigning up to four representatives to be "trainers" and directing them to leave their own territories and work with the new hire in his territory over a four week period (JA 21-22, 51, 78-79; T_1:63; T_2:9, 52-53).

The regional manager was required to prepare periodic performance appraisals, employe profiles and grading reports and to prepare letters of reprimand when necessary (JA 105, 109-10, 111-12; T_2:53, 136, 144, 162; Exs. 16-27). He was able to do so because he spent a minimum of fifty percent of his time in the field with representatives, an unspecified portion of which was devoted to "supervisory or managerial activities" (JA 81; T_2:57, 134). The remaining

thirty to thirty-five percent of his time was devoted to calling on his own direct accounts and to "territory analysis" (JA 81, 105; T_2:57, 133). Such analysis apparently was necessary in order to prepare reports concerning "the sales of the various Wrigley products in the region" and "provide statistical support regarding field data" (Exs. 7, 9).

Once or twice each year, the regional manager held all-day sales meetings which were usually conducted at a local hotel or motel (JA 55, 90-91; T_2:14-15, 105-06). Some of them were attended by the district manager, who came to Wisconsin about six to nine days each year (JA 99; T_2:116-17).

From 1973 through March of 1976, the regional manager maintained an office in his home for which he claimed federal and Wisconsin income tax deductions (JA 69; T_2:31). It was used to prepare reports, salary descriptions and other items required by Wrigley and contained bulletins, account files, files for each representative and personnel files, some of which were stored in a company-owned filing cabinet (JA 67-69; T_2:29-31). During that period, he also acted as a mediator from two to three times per year when a credit dispute would become particularly difficult (JA 71-72, 69; T_2:34-36).

In 1973, a representative was terminated and his station wagon, gum, displays and other materials placed in storage in warehouse space owned by a local moving company (JA 61-62; T_2:22). In an arrangement approved by Wrigley, the regional manager placed the monthly rental on his expense account and was reimbursed by the company (JA 62, 70-71; T_2:22, 31-32). Once a replacement was hired, the storage of the car ceased, but with Wrigley's permission, he continued to place the storage of the other items on his own expense account because they would not fit in his apartment (JA 62, 71; T_2:23, 32). All of his gum

and displays were, therefore, shipped by Wrigley to the warehouse (JA 70; T_2:32). This arrangement, which was estimated in 1985 to have cost approximately thirty dollars per month, continued through all six tax years (JA 100, 120-21; T_2:118, 176).

The Wisconsin Tax Appeals Commission, using standards promulgated by the Multistate Tax Commission for guidance, held that the following activities were not closely related to solicitation: 1) maintenance of a stock of gum and replacement of stale gum; 2) maintaining product displays with respect to location, design and content; 3) direct gum sales by means of agency stock checks; 4) maintenance of offices in the home by the resident regional managers; 5) conducting training sessions; 6) participation in hiring, firing, training, evaluating and recommending compensation for sales representatives on the part of the regional manager; 7) preparation of periodic sales analyses and reports by the regional manager; 8) involvement in credit transactions by the regional manager for tax years 1973-1975; 9) rental of storage space; and 10) non-incidental advertising (A 249-53).

On judicial review on the record under chapter 227, Wis. Stats., the Dane County Circuit Court held that all of Wrigley's Wisconsin activities constituted "'lesser, included phases' [of solicitation] . . . which Congress intended to . . . protec[t]" (A 140) (citation omitted).

On appeal, the Wisconsin Court of Appeals held that solicitation includes "those generally accepted or customary acts in the industry which lead to the placing of orders" but "not . . . those acts which follow as a natural result of the transaction." *Wrigley*, 451 N.W.2d at 448, 449. Employing this standard, it found that Wrigley was not entitled to claim the limited immunity afforded by the statute: "Wrigley's Wisconsin employees were not just 'missionaries.' They were hirers, firers, meeting organizers, trainers, customer credit 'intervenors' or

'mediators,' renters of warehouse space, stale product replacers, inventory-carriers, display stockers, sellers and billers." *Wrigley*, 451 N.W.2d at 452.

Reversing, the Wisconsin Supreme Court held that solicitation "includes activities incidental to the initial contact between the buyer and the seller" even when "th[e] orders may be future orders." *Wrigley*, 465 N.W.2d at 809, 811. It determined that factors to be considered in employing this standard include whether the company maintains a warehouse or a stock of goods within the state, the type of business involved, the manner in which orders are solicited and the way products are sold. *Wrigley*, 465 N.W.2d at 812. It also ruled that, in applying these factors, deviations from the norm may be considered *de minimis*, a concept that had also been adopted by the circuit court (A 142). *Wrigley*, 465 N.W.2d at 812. It then held that the provisions of § 381 voided the assessment made under the state statute. *Wrigley*, 465 N.W.2d at 812.

SUMMARY OF ARGUMENT

Section 381 alters the preexisting authority of the states to fairly apportion income derived from sales by foreign corporations within their boundaries. The Wisconsin Supreme Court ignored the fundamental principle that, even after its passage, taxation remained the rule, with solicitation immunity constituting a new, but limited exception. It, therefore, failed to accord unambiguous statutory terms that continued to permit taxation their plain meaning, and to construe any ambiguity in the statute so as to preserve the states' fundamental taxing power to the extent permissible under the language employed by Congress.

The Wisconsin Supreme Court's decision also erroneously focuses upon the presence or absence of physical plant as being determinative of a state's ability to impose an income or franchise tax upon a foreign corporation. It ignores the gradual evolution in the concept of nexus so as to account for a foreign corporation's economic presence within the taxing state. That economic presence, which is reflected in a myriad of supervisory, managerial and other activities engaged in by Wrigley within Wisconsin's boundaries, elevates Wrigley's nexus with Wisconsin beyond the minimal standard defined by § 381. The Wisconsin Supreme Court's decision that § 381 preempts the provisions of section 71.01(2), Wis. Stats., insofar as it imposes a franchise tax on Wrigley for doing business within the state, is therefore erroneous, and should be reversed by this Court.

ARGUMENT

THE WISCONSIN SUPREME COURT INCORRECTLY DETERMINED THAT WISCONSIN'S FRANCHISE TAX STATUTE WAS PREEMPTED BY THE PROVISIONS OF PUB. L. NO. 86-272 ON THE BASIS THAT THE ONLY NEXUS BETWEEN THE WILLIAM WRIGLEY, JR. CO. AND THE STATE OF WISCONSIN CONSISTED OF THE SOLICITATION OF ORDERS FOR APPROVAL AND DELIVERY FROM A POINT OUTSIDE THE STATE.

A. The Wisconsin Supreme Court's Decision Fails to Construe § 381 In A Manner Consistent With The Court's Decisions Concerning Commerce Clause Preemption.

1. In exercising its powers under the Commerce Clause, Congress is presumed not to have significantly altered the preexisting authority of the states unless it uses unmistakable language to do so.

In *N.W. States Portland Cement Co. v. State of Minn.*, 358 U.S. 450, 454 (1959), the Court held that due process permits the imposition of a fairly apportioned tax where a foreign corporation engages in "a regular and systematic course of solicitation of orders for the sale of its products." Nexus was found to exist because the "corporations engage[d] in substantial income-producing activity in the taxing States." *Id.*, at 465. The Court also held that such taxes did not violate the Commerce Clause, distinguishing between "an invalid direct levy which placed a burden on interstate commerce and a charge by way of net income derived from profits from interstate commerce." *Id.*, at 459.

Responding to pointed dissents by Justice Whittaker and Justice Frankfurter, Justice Harlan explained that "past decisions of this Court clearly point to, if indeed they do not compel, the sustaining of these two state taxing measures." *Id.*, at 465 (Harlan, J., concurring). Nevertheless, as the Court later recognized, the decision triggered a swift lobbying effort from business interests which culminated in the passage of § 381:[7]

> The impetus behind the enactment of § 381 was this Court's opinion in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 359 U.S., at 452, 79 S.Ct., at 359. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub.L. 86-272, 73 Stat. 555, 15 U.S.C. § 381 [15 U.S.C.S. § 381], within seven months.
>
> In this statute, Congress attempted to allay the apprehension of businessmen that *"mere solicitation"* would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the

[7]The bill has been described as "a piece of hasty, hysteria legislation . . . pressured through the Congress by a highly organized and certainly skillfully handled group of trade organizations." Roland, *State Taxation of Interstate Income: A State Tax Administrator's Viewpoint*, 12 The Tax Executive 35, 35 (1959).

> situation, Northwestern States Portland Cement did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed *to define clearly a lower limit for the exercise of that power. Clarity that would remove uncertainty was Congress' primary goal.*

Heublein, Inc. v. South Carolina Tax Commission, 409 U.S. 275, 279-80 (1972) (footnotes omitted; emphasis supplied).

"The power of taxation is fundamental to the very existence of the government of the states." *State Board of Tax Com'rs of Indiana v. Jackson*, 283 U.S. 527, 537 (1931). And, as Justice Harlan explained in *Portland Cement*, the states' authority to impose fairly apportioned taxes on foreign corporations with employes continuously and systematically doing business within their boundaries had previously been upheld. *West Publishing Co. v. McColgan*, 328 U.S. 823 (1946) (per curiam). *Also see, e.g., Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920).

When Congress chooses to alter such preexisting, fundamental powers of the states, it must do so clearly and unambiguously:

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 242[, 105 S. Ct. 3142, 3147, 87 L.Ed. 2d 171] (1985); *see also Pennhurst State School and Hospital v. Halderman*, 465 U. S. 89, 99[, 104 S. Ct. 900, 907, 79 L.Ed. 2d 67] (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention

> "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230[, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447] (1947) . . . .

Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989). *Also see Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 2281 (1989). Thus, where Congressional preemption of state regulatory activity in the exercise of its Commerce Clause powers is less than clear, it will not be implied. *See generally, Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 n.33 (1986).

These principles of statutory construction have already been applied by the Court to § 381: "'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.'" *Heublein*, 409 U.S. at 282-83, *quoting United States v. Bass*, 404 U.S. 336, 349 (1971). They were not, however, taken into consideration by the Wisconsin Supreme Court or by any other state court that has had occasion to construe the provisions of § 381.

2. A uniform pre-sale/post-sale standard for determining solicitation immunity accommodates Congress' objectives of predictability and certainty in making nexus determinations while simultaneously preserving the states' preexisting taxing authority to the extent permissible under the language employed by Congress in § 381.

a. The statute contains no industry-specific standard.

Most litigation in the state courts under § 381 has centered around the meaning of the term "solicitation":

> [C]ourts have adopted one of three successively more inclusive definitions of "solicitation": (1) the specific act of asking a customer to purchase one's product . . . [8]; (2) any act which *leads to* the purchase of one's product as opposed to acts which *follow from* the purchase . . . [9]; and (3) any act which *leads to* or *follows from* the purchase so long as said act is *incidental* to the purchase . . . [10].

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[8]Decisions of state courts of last resort which have employed the narrowest of the three definitions include *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W.2d 557 (1971) and *Clairol, Incorporated v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1972).

[9]Decisions of state courts of last resort which have employed definitions no broader than this intermediate standard include *Drackett Products Co. v. Conrad*, 370 N.W.2d 723 (N.D. 1985); *Sjong v. State, Dept. of Revenue*, 622 P.2d 967 (Alaska 1981), *appeal dismissed*, 454 U.S. 1131 (1982); *Jantzen, Inc. v. District of Columbia*, 395 A.2d 29 (D.C. App. 1978); *Miles Laboratories, Inc. v Department of Revenue*, 274 Or. 395, 546 P.2d 1081 (1976); and *Chattanooga Glass* itself. *Also see Matthew Bender & Co. v. Comptroller*, 67 Md. App. 693, 509 A.2d 702 (1986); *Consolidated Accessories Corp. v. Franchise Tax Board*, 161 Cal. App. 3d 1036, 208 Cal. Rptr. 74 (1984); *National Tires, Inc. v. Lindley*, 68 Ohio App.2d 71, 426 N.E.2d 793 (1980).

[10]Decisions of state courts of last resort which have adopted the broadest of these three standards include *Ind. Dept. of Revenue v. Kimberly-Clark Corp.*, 275 Ind. 378, 416 N.E.2d 1264 (1981); *Deseret Pharm. Co., Inc. v. State Tax Comm*, 579 P.2d 1322 (Utah 1978); *U.S. Tobacco Co. v. Com.*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978); *Gillette Company v. State Tax Commission*, 56 A.D.2d 475, 393 N.Y.S.2d 186 (1977), *aff'd*, 45 N.Y.2d 455, 410 N.Y.S.2d 65, 382 N.E.2d 764 (1978); *Coors Porcelain Company v. State*, 183 Colo. 325, 517 P.2d 838 (1973), *cert. denied*, 419 U.S. 874 (1974); *State v. State Tax Commission*, 382 S.W.2d 645 (Mo. 1964); and *Smith Kline &*

(continued...)

Chattanooga Glass Co. v. Strickland, 244 Ga. 603, 261 S.E.2d 599, 600-01 (1979) (emphasis supplied; citations omitted).

The Wisconsin Supreme Court sided with the minority of jurisdictions that have expansively construed the statute. It also held that, in delineating those activities encompassed by the term "solicitation," an appropriate reference point is "the type of business involved." *Wrigley*, 465 N.W.2d at 812. This industry-specific aspect of the standard, which was also accepted by the court of appeals below, originates in the Oregon courts. *See Miles Laboratories*, 546 P.2d at 1083, *quoting Olympia Brewing Co. v. Department of Revenue*, 5 Or. T.R. 99, 110 (1972), *aff'd*, 266 Or. 309, 511 P.2d 837 (1973), *cert. denied*, 415 U.S. 976 (1974). Since many state courts rely upon the substantial body of law Oregon has developed in this area, it has gained some acceptance without critical examination. It should be recognized, however, that *Olympia Brewing* itself holds that "many businesses, by their very nature, cannot claim the benefits of the federal statute." *Id.*, 5 Or. T.R. at 110. Given this language, it is doubtful that the Oregon courts have adopted an industry-specific standard in the sense urged by Wrigley.

There is no mention of any industry-specific standard in § 381. The Wisconsin Supreme Court's acceptance of Wrigley's claim that the chewing gum industry is unique and therefore must operate in a certain fashion effectively allows Wrigley to determine its own immunity from taxation because Wrigley *is* the industry.

In 1987, for example, Wrigley occupied fifty percent of the entire chewing gum market, while twenty-eight percent was held by American Chicle and twenty percent

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[10](...continued)
French Laboratories v. State Tax Com'n, 241 Or. 50, 403 P.2d 375 (1965) (since repudiated).

by Nabisco,[11] leaving only two percent of the market for the "small-and medium-sized businesses" that § 381 was intended to protect. S. Rep. No. 658, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2548, 2551. It would truly be ironic if the largest business in an industry of large businesses could determine its own immunity from state taxation under such a statute.

In exercising its powers under the Commerce Clause, Congress did not clearly delegate the authority to entire industries to influence immunity under the statute. There is therefore no warrant for the industry-specific statutory construction advocated below by Wrigley.

b. The pre-sale/post-sale standard preserves Congress' goal of predictability and certainty while simultaneously accommodating any broadening of the literal language of the statute which may be necessitated by resort to its legislative history.

Since "Congressmen typically vote on the language of a bill" the ordinary meaning of the words used should be determinative of a statute's meaning. *United States v. Locke*, 471 U.S. 84, 95 (1985). As the Wisconsin Supreme Court recognized, the ordinary meaning of the term "solicit" is to ask for something. *Wrigley*, 465 N.W.2d at 809. The Arkansas and New Jersey courts apply that ordinary meaning when determining immunity under § 381 and therefore do not permit any activity other than requesting the customer to purchase the product. Although that construction of the statute is acceptable to Wisconsin, the assessment in this case was based on the pre-sale/post-sale standard developed by the Oregon courts (Ex. B).

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[11]*The Los Angeles Times* (April 15, 1987).

Deviation from the ordinary and accepted meaning of terms in a statute is permissible only if resort to its legislative history is required. But, "'[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is "a step to be taken cautiously" even under the best of circumstances.'" *Locke*, 471 U.S. at 95-96 (citations omitted). Given the rules of construction applicable to preemptive Commerce Clause statutes, resort to legislative history may not even be required. If such resort is permissible, it is only to search for "clearly expressed legislative intention to the contrary." *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The views of Senator Byrd, the sponsor of the bill, reveal no conclusive intent to define "solicitation" in a manner contrary to its ordinary and accepted meaning:

> Mr. President, all in the world the bill would do is to say that business which originates from the solicitation of a *traveling salesman, who does not have an office* and who does not have any facilities whatever, except perahaps (sic) his own automobile or his own legs, which business originates in one State when title is transferred in another State, since the sale is not consummated in the State involved, is business which shall not be taxed, as interstate commerce, in regard to income taxes. That is all the bill would do. It has been stripped down to the point that that is *the only thing the bill would do.*
>
> . . . .
>
> Let me say a word about small business. The Senator from Alabama is interested in the protection of small business. Big business can get orders by advertising over the television and in the newspapers. Big business concerns spend millions of dollars advertising on the television and in newspapers. Frequently the small businessman must send a salesman in to get the business.
>
> What about the orders which are obtained by mail order houses? Should such transactions be taxed? The mail order houses send a booklet into the State, and the recipient notes from that book what he wants to buy. *All that the small businesses can do is to send in salesmen. They have no office. They do no business in the State, except to solicit orders.*

105 Cong. Rec. 16493-16494 (1959) (emphasis supplied).

The Senate Committee report appears to define "mere solicitation" with respect to the "Brown-Forman case." S. Rep. No. 658, 86th Cong., 1st Sess. *reprinted in* 1959 U.S. Code Cong. & Ad. News 2548 (footnote omitted).

Although *Portland Cement* may have created the initial impetus for legislative action, Congress was also reacting to two later cases in which the Court refused to grant certiorari. In each instance, a state court decision had extended the reasoning in *Portland Cement* so as to permit the imposition of state income tax on out-of-state corporations even though those corporations only employed non-resident "drummers" or "missionary men" and did not maintain any physical facilities within the taxing state. *Brown-Forman Distill. Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958), *cert. denied*, 359 U.S. 28 (1959); *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959). In *Brown-Forman*, 101 So.2d at 70, the taxpayer employed "missionary men" who "neither solicit nor accept orders from the retail dealers." They called on wholesalers and sometimes assisted wholesalers' salesmen in attempting to obtain suitable displays in retail establishments. In

International Shoe, 107 So.2d at 640, the taxpayer apparently employed "drummers" since it operated "all of its business outside of the State of Louisiana." It engaged in the "systematic solicitation of orders for its product by fifteen salesmen." *Id.*

It is "generally believed" that § 381 did not overrule the result reached in *Portland Cement*. Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law* 86-272, 38 Tax Lawyer 293, 302 (1985). Although it may have intended to reverse the results reached in *Brown-Forman* and *Fontenot*, there is no evidence of any post-sale activity in either of those cases. Certainly, neither of them involved a stock of goods within the state like that used by Wrigley's representatives.

Senator Sparkman, the sponsor of S.J. Res. No. 113, a bill that limited the states' authority to tax to a greater degree than did S. 2524 made the following remarks about that device:

> Senator TALMADGE. You could put the words "stock of goods other than for the purposes of demonstrating samples," and that would cover it insofar as the stock of goods situation is concerned.
>
> Senator SPARKMAN. Well, that could be done. I should think that ordinarily the term "stock of goods" would not include samples from which orders will be taken. But the minute you start selling those goods off the shelves, why then, I think the nature of the goods changes, the operations change.

Hearings Before The Committee On Finance, U.S. Senate, 86th Cong., 1st Sess. 92 (July 21, 1959). As the court of appeals explained below, the other activities engaged in by Wrigley's sales representatives were even farther removed

from the act of requesting the customer to purchase the product.

The pre-sale/post-sale standard also provides a clear line of demarcation permitting such activities as the use of samples and product demonstrations. It therefore creates certainty on behalf of both the taxpayer and the taxing authority. The Wisconsin Supreme Court's post-sale "incidental activity" standard does not. That court freely acknowledged that the "pre-sale/post-sale test may produce consistency and predictability." *Wrigley*, 465 N.W.2d at 809. Yet, it held that any activity whose purpose is "encouraging future orders" constitutes "solicitation." *Id.* That standard effectively immunizes any business activity engaged in by Wrigley, since the only business in which it is engaged is the manufacturing of gum to be sold in retail establishments. Every action taken by Wrigley is presumably calculated to enhance that goal.

The commentators have criticized such an expansive solicitation standard not only as being unworkable, but also as creating a competitive disadvantage to intrastate domestic business. Note, *Public Law* 86-272: *Legislative Ambiguities and Judicial Difficulties*, 27 Vand. L. Rev. 313, 340 (1974); *Federal Limitations* § 9:14, at 517-18. For policy reasons alone, it should not be accepted by this Court.

The central theme that permeates the Wisconsin Supreme Court's decision is that immunity is the rule and taxation the exception. That statutory construct alters the preexisting powers of the states to a degree not supported by clearly expressed textual language. It is inconsistent with the principles of federalism articulated in *Heublein* and therefore should not be allowed to stand.

3. In the absence of rare and exceptional circumstances, unambiguous statutory terminology must be enforced by the courts.

If federal statutory language is clear, it is ordinarily conclusive. *United States v. Clark*, 454 U.S. 555, 560 (1982). If rare and exceptional circumstances are not present, judicial inquiry is therefore complete when particular terms in a statute are unambiguous. *Demarest v. Manspeaker*, __ U.S. __, 111 S. Ct. 599, 604 (1991). In such situations, inquiry into legislative history becomes "irrelevant." *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461 (1987). A court's sole obligation is then to enforce the unambiguous statutory terms. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 1030 (1989).

The Wisconsin Supreme Court failed to identify any rare and exceptional circumstances entitling it to ignore the unambiguous term "only." Only by doing so can a *de minimis* standard be applied.

4. The application of the *de minimis* doctrine so as to excise the word "only" from the statute was improper because no rare and exceptional circumstances can possibly exist in light of the narrow scope accorded Congress when it exercises its powers of preemption under the Commerce Clause.

Since any ambiguity in a statute preempting the fundamental powers of the states must be construed in favor of the retention of such power, unambiguous statutory language *preserving* such powers must necessarily be conclusive. There is no doubt that the statutory terminology is unambiguous: "Public Law 86-272 provides for no 'exceptions' to the statutory

requirements that there must be *only solicitation of orders* before an exemption from taxation will be granted." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:12, at 507.

Heublein, 409 U.S. at 278–79, is therefore fatal to Wrigley because the Court there held that the transfer of products within the State "clearly was neither 'solicitation' nor the filling of orders 'by shipment or delivery from a point outside the State' within the meaning of § 381(a)(1)." Similarly, the agency stock check procedure periodically employed by Wrigley involved delivery to a retailer from a stock of goods within Wisconsin in contravention of the explicit language of § 381.

Wrigley's credit mediation and warehouse rental activities also are hardly commonly understood forms of solicitation. In order to hurdle these and other problems surrounding Wrigley's actual conduct in this case, the Wisconsin Supreme Court effectively held that compliance with the statute is excused unless *non*compliance is "of sufficient weight in the flow on interstate commerce." *Wrigley*, 465 N.W.2d at 811.

Not only does that holding excise the word "only" from the statute, it also inverts its entire premise. The statute *permits* taxation unless the taxpayer's "only" activities involve a specified manner of "solicitation" and "delivery." The Wisconsin Supreme Court's holding *prohibits* taxation unless the taxpayer engages in a requisite, but entirely unspecified, quantum of those two activities. Such a *de minimis* standard hardly promotes clarity or removes uncertainty, since its bounds can never be ascertained in advance by either the taxpayer or the state taxing authority.

This *de minimis* doctrine also fails to address the fact that the entire issue in *Portland Cement* revolved around the question of nexus. While an isolated incursion into a

state may not create nexus sufficient to justify taxation of a foreign corporation, the systematic exploitation of a domestic market by such a corporation is precisely the kind of activity that warrants the imposition of a fairly apportioned tax. In contrast, a *de minimis* doctrine improperly permits a foreign corporation to measure any claimed violation of the requirements of the statute against its success in exploiting the domestic market. The *greater* that success, which would normally *increase* the justification for the imposition of a fairly apportioned tax, the *more* tenable a *de minimis* claim will be.

B. The Wisconsin Supreme Court's Holding Ignores The Economic Realities That The Concept Of Nexus Is Intended To Reflect.

1. Congress recognized that the concept of nexus would continue to be defined by the courts.

Even after the passage of § 381, a vast continuum of nexus determinations remained the province of the courts. In *Heublein*, 409 U.S. at 280, the Court recognized that the focal point of Congress' concern in § 381 involved the question of nexus. But Congress recognized that an entire range of business activity between "mere solicitation" and other forms of activity that had already been recognized by the courts as creating nexus remained subject to judicial review:

> Whether business activities other than those described in the bill constitute a sufficient basis for the imposition by a State or political subdivision thereof of a net income tax on income derived from interstate commerce is left for future determination by the Congress, or in the absence of congressional action, by the courts.

S. Rep. No. 658, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2548, 2524. Senator Byrd, the floor manager of S. 2524 also had the following colloquy with Senator Javits which reinforces the language contained in the Senate Report:

> MR. JAVITS: Is it the theory of this measure that it is a bracket--in other words, that, on the one hand, it prevents taxation when there is just order-taking, without order acceptance, and on the other hand, taxation is permitted when there is a corporation, incorporated under the laws of a State, or an individual who is domiciled in that State, and that in between, the various questions or the range of questions are still left to court adjudication, as in the present way?
>
> . . . .
>
> MR. JAVITS: Is that the theory of this proposed legislation?
>
> MR. BYRD of Virginia: Yes.

105 Cong. Rec. 17834 (1959).

Nexus jurisprudence has undergone a considerable evolution under both the Commerce Clause and the Due Process Clause since the Court's decision in *Portland Cement*. A tax does not violate the Commerce Clause if it 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services the state provides. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *Complete Auto* overruled a line of cases culminating in *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), which had adhered to the principle that a direct tax on interstate commerce is unconstitutional, a view expressed in the

Senate debates by many of the proponents of § 381 as justification for its passage. *See, e.g.*, 105 Cong. Rec. 16475 (1959) (remarks of Senator Cooper).

The concept of nexus under the Due Process Clause has undergone a parallel transformation. It has long been held that a tax does not violate the Due Process Clause if there is 1) a "minimal connection" or nexus between the interstate activities and the taxing state, and 2) a "rational relationship" between income attributed to the state and intrastate values of the enterprise. *Trinova Corp. v. Michigan Dept. of Treasury*, __ U.S. __, 111 S. Ct. 818, 828 (1991). Under traditional due process doctrine nexus was found to exist where a state afforded protection to property through such means as fire and police services. *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). *See State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 216 (N.D. 1991), *cert. granted*, No. 91-280.

Under the Commerce Clause, a "wide range of benefits" including the "advantages of a civilized society" now satisfies the requirement that the tax fairly relate to benefits the state provides. *Goldberg v. Sweet*, 488 U.S. 252, 257 (1989). And under the Due Process Clause, a myriad of items, such as the advantages of a civilized society and other intangible factors including a trained work force have been determined to be sufficient to satisfy the nexus requirement. *See, e.g., Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980).

Due process and Commerce Clause nexus doctrines have evolved so as to establish a "'consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax.'" *Trinova*, 111 S. Ct. at 828, *quoting Mobil Oil Corp. v. Com'r of Taxes of Vermont*, 445 U.S. 425, 443 (1980). Where nexus is in issue, modern decisions have therefore looked to the economic realities of the asserted basis for taxation: "[I]n actuality the homes of these officials were used as corporate offices. Despite their label

as 'homes' they served the corporation just as effectively as 'offices.'" *General Motors Corporation v. Washington*, 377 U.S. 436, 447 (1964), *overruled on other grounds, Tyler Pipe Indus. v. Wash. State Dept. of Rev.*, 483 U.S. 232 (1987).

Economic considerations are therefore fundamental to any determination as to whether nexus exists.

2. The concept of nexus has evolved so as to account for the degree of economic contact that the foreign corporation has with the taxing state.

In its response to the petition at 6, Wrigley concedes that, but for § 381, "a 'nexus' sufficient to pass constitutional muster otherwise may exist." But Wrigley conveniently fails to mention and the Wisconsin Supreme Court apparently was unwilling to consider that there is not simply minimal nexus here, but rather "'nexus' aplenty." *Compare D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988). Such nexus necessarily results from Wrigley's massive economic presence in Wisconsin. *Compare Quill*, 474 N.W.2d at 211.

Since its founding in 1890, Wrigley has almost always been the largest manufacturer of chewing gum in the world.[12] Its worldwide sales now exceed one billion dollars.[13] It commands more than one half of the entire chewing gum market.[14] It is one of the top fifty domestic food and beverage manufacturers in terms of sales and one

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[12]*The Economist* (June 9, 1990); *The New York Times* (December 27, 1980).

[13]*The San Francisco Chronicle* (January 31, 1991).

[14]*Investor's Daily* (January 5, 1990).

of the top one hundred domestic advertisers, with annual spending of approximately $125 million.[15]

It is precisely because Wrigley is the goliath of the chewing gum industry that it has been forced to assign duties other than "mere solicitation" to its employes in Wisconsin. As was true in *General Motors*, the economic reality in this case is that its regional managers had offices in Wisconsin. Indeed, the appellation "manager" itself belies any claim that such persons engage *only* in solicitation.

Wrigley's representatives also are unlike classic "missionary men" or even "drummers" who carried samples with them from place to place. Only a small fraction of a Wrigley representative's gum and display stands are not in storage at any given time. The economic reality is that the remainder constitutes a stock of goods in storage in Wisconsin just as surely as it would have had it been placed in a warehouse. Moreover, even under earlier concepts of nexus, property-protection services were provided to Wrigley in connection with those items that actually were stored in a warehouse. A civilized society provides such services, regardless of the size or quantity of product in storage. Wrigley's regional manager recognized as much when he chose to store a car at that location: "One thing you wanted to do, you wanted to make sure it was stored in a safe location, and it was protected. And that was the main consideration" (T_2:23). He also recognized that, in economic reality, a training center was being operated by Wrigley in Wisconsin: "We did not have a training center like we do now, so the basic responsibility to see that a new hire was property trained was in the hands of the regional manager" (T_2:9).

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[15] *Prepared Foods* (July, 1990); *Advertising Age* (September 26, 1990).

Not only did Wisconsin afford Wrigley the advantages of a trained work force, it also provided the taxpayer-financed wherewithal to skim the cream of that force through its state employment offices and universities. The same kinds of subsidies result from the state tax deduction taken by the first of Wrigley's regional managers and from Wrigley's use of Wisconsin landfills. *Compare Quill*, 470 N.W.2d at 218. The decision below means that, far from being able to "ask return," *J.C. Penney*, 311 U.S. at 444, Wisconsin will continue to subsidize Wrigley in its exploitation of Wisconsin's consumer market.

The evolution of the decisional law concerning nexus to reflect the substantive economic presence of the foreign corporation in the taxing state demonstrates why Wrigley's presence in Wisconsin far exceeds the "minimal standard" which Congress sought to establish. 105 Cong. Rec. 17771 (1959) (statement of Representative Celler). To hold otherwise would result in the expansive interpretation of a statute which embodies a vestigial legal doctrine:

> Pub. L. No. 86-272 prevents, *inter alia*, a state from imposing a net income tax on the income derived within its borders by a person whose only activities are the solicitation of orders. In today's economy, an out-of-state corporation can achieve substantial market penetration and still qualify for Pub. L. No. 86-272's exemption by soliciting through the use of radio, television, telephone, and the mail; the statute thus appears to embody an antiquated concept of tax jurisdiction. . . .
>
> . . . Over time, technological developments will make the antediluvian approach of Pub. L. No. 86-272 increasingly obvious. For similar reasons, *National Bella Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), needs re-examination.

Pomp, *State Tax Reform For The Eighties: The New York Tax Study Commission*, 16 Conn. L. Rev. 925, 927-28 n.8 (1984).

The Wisconsin Supreme Court appears to have been under the assumption that its nexus determination involved the selection of one of two alternatives: solicitation immunity or the existence of nexus resulting from the presence of real estate or physical plant. Although Wrigley has no real estate or physical plant in the state, its economic presence and concomitant activities within Wisconsin indicate that it has nexus well beyond "mere solicitation."

That economic presence, as evidenced by those activities, elevates this particular nexus determination to a level within the range of judicial decision-making which Congress acknowledged that it had left untouched. Once it is determined that a finding of nexus is permissible under § 381, it inevitably must be made.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed, the franchise tax assessment reinstated, and the cause remanded to the Wisconsin Supreme Court for further proceedings consistent with this Court's opinion.

Dated this 21st day of November, 1991.

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No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ of Certiorari To
The Supreme Court of Wisconsin

APPENDIX TO BRIEF FOR PETITIONER

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An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I - IMPOSITION OF MINIMUM STANDARD

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to --

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section --

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

Sec. 102. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

(b) The provisions of subsection (a) shall not be construed --

(1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

Sec. 103. For purposes of this title, the term "net income tax" means any tax imposed on, or measured by, net income.

Sec. 104. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of this title or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

TITLE II -- STUDY AND REPORT BY CONGRESSIONAL COMMITTEES

Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommending to the Congress proposed legislation providing uniform standards to be observed by the States in imposing income taxes on income so derived.

Sec. 302. The Committees shall report to their respective Houses the results of such studies together with their proposals for legislation on or before July 1, 1962.

Approved September 14, 1959.

Section 71.02, Wis. Stats (1973)

FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation, except corporations specified in sub. (3), shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year at the rates set forth in s. 71.09(2am). Every corporation organized under the laws of this state shall be deemed to be residing within this state for the purposes of this franchise tax. All provisions of chs. 71 and 73 relating to net income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise. The tax imposed by this subsection on national banking associations shall be in lieu of all taxes imposed by this state on national banking associations to the extent it is not permissible to tax such associations under federal law. The tax imposed by this subsection on insurance companies subject to taxation under this chapter, except societies, organizations or corporations (including any division or agency of any such society, organization or corporation) operating plans of sickness care under ch. 148, hospital service under s. 182.032, dental care under s. 447.13, prepaid prescription plans under s. 450.13, or prepaid optometric service plans under s. 449.15, shall be based on net income computed under sub. (4), and no other provision of this chapter relating to computation of taxable income for other corporations shall apply to such insurance companies. All other provisions of this chapter shall apply to insurance companies subject to taxation under this chapter unless the context clearly requires otherwise. The tax imposed upon societies, organizations or corporations (including any division or agency of any such society, organization or corporation) operating plans of sickness care under ch. 148, hospital service under s. 182.032, dental care under s. 447.13, prepaid prescription plans under s. 450.13, or prepaid

optometric service plans under s. 449.15, shall be upon such net income as is determined by application to such companies of those provisions of the internal revenue code applicable to mutual insurance companies, other than life insurance companies or mutual marine insurance companies, having total receipts over $500,000 subject to any applicable addition or subtraction as provided in sub. (4)(a).

Section 71.02, Wis. Stats (1975)

FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation, except corporations specified in sub. (3), shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year at the rates set forth in s. 71.09(2am), (2k) and (2m). Every corporation organized under the laws of this state shall be deemed to be residing within this state for the purposes of this franchise tax. All provisions of chs. 71 and 73 relating to net income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise. The tax imposed by this subsection on national banking associations shall be in lieu of all taxes imposed by this state on national banking associations to the extent it is not permissible to tax such associations under federal law. The tax imposed by this subsection on insurance companies subject to taxation under this chapter, except societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be based on net income computed under sub. (4), and no other provision of this chapter relating to computation of taxable income for other corporations shall apply to such insurance companies. All other provisions of this chapter shall apply to insurance companies subject to taxation under this chapter unless the context clearly requires otherwise. The

tax imposed upon societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be upon such net income as is determined by application to such companies of those provisions of the internal revenue code applicable to mutual insurance companies, other than life insurance companies or mutual marine insurance companies, having total receipts over $500,000 subject to any applicable addition or subtraction as provided in sub. (4)(a).

Section 71.02, Wis. Stats (1977)

FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation, except corporations specified in sub. (3), shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year at the rates set forth in s. 71.09(2m). Every corporation organized under the laws of this state shall be deemed to be residing within this state for the purposes of this franchise tax. All provisions of chs. 71 and 73 relating to net income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise. The tax imposed by this subsection on national banking associations shall be in lieu of all taxes imposed by this state on national banking associations to the extent it is not permissible to tax such associations under federal law. The tax imposed by this subsection on insurance companies subject to taxation under this chapter, except societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be based on net income computed under sub. (4), and no other provision of this chapter relating to computation of taxable income for other corporations shall apply to such insurance companies. All other provisions of this chapter shall apply to insurance companies subject to taxation under this chapter unless the

context clearly requires otherwise. The tax imposed upon societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be upon such net income as is determined by application to such companies of those provisions of the internal revenue code applicable to mutual insurance companies, other than life insurance companies or mutual marine insurance companies, having total receipts over $500,000 subject to any applicable addition or subtraction as provided in sub. (4)(a).

Section 71.02, Wis. Stats (1979-80)

FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation, except corporations specified in sub. (3), shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year at the rates set forth in s. 71.09(2m). Every corporation organized under the laws of this state shall be deemed to be residing within this state for the purposes of this franchise tax. All provisions of chs. 71 and 73 relating to net income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise. The tax imposed by this subsection on national banking associations shall be in lieu of all taxes imposed by this state on national banking associations to the extent it is not permissible to tax such associations under federal law. The tax imposed by this subsection on insurance companies subject to taxation under this chapter, except societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be based on net income computed under sub. (4), and no other provision of this chapter relating to computation of taxable income for other corporations shall apply to such insurance companies. All other provisions of this chapter shall apply to insurance

companies subject to taxation under this chapter unless the context clearly requires otherwise. The tax imposed upon societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be upon such net income as is determined by application to such companies of those provisions of the internal revenue code applicable to mutual insurance companies, other than life insurance companies or mutual marine insurance companies, having total receipts over $500,000 subject to any applicable addition or subtraction as provided in sub. (4)(a).

S. 2524

IN THE SENATE OF THE UNITED STATES

August 11, 1959

Mr. Byrd of Virginia, from the Committee on Finance, reported the following bill; which was read twice and placed on the calendar

A BILL

Relating to the power of the States to impose net income taxes on income derived from interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) no State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business 2activities within such State by or on behalf of such person during such taxable year are any, or all, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State;

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective client or customer of such person, if orders by such client or customer to such person to enable such client or customer to fill orders

resulting from such solicitation are orders described in paragraph (1); and

(3) the maintenance and operation by such person, or by his representative, in such State of an office the primary purpose and use of which is to serve representatives of such person who are engaged in the solicitation of orders described in paragraph (1) or (2), or both, and to receive, process, and forward such orders.

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to --

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors.

(d) For purposes of this section --

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

SEC. 2. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by the first section of this Act.

(b) The provisions of subsection (a) shall not be construed --

(1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

SEC. 3. For purposes of this Act, the term "net income tax" means any tax imposed on, or measured by, net income.

SEC. 4. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.